



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: AUGUST 16, 2022

IN THE MATTER OF:

Appeal Board No. 622753

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determination, disqualifying the claimant from receiving benefits, effective November 23, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and disqualifying the claimant from receiving benefits, effective November 23, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 23, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed April 1, 2022 (), the Administrative Law Judge overruled the initial determination of misconduct and sustained the initial determination of voluntary separation from employment without good cause.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed for nine years, most recently as a part-time registered nurse, for a hospital. She worked as a night nurse in the

pediatric intensive care unit. She is a member of an independent church and is a born-again Christian.

On August 20, 2021, the employer notified employees that the employer would be requiring all employees to be vaccinated against Covid-19. On September 27, 2021, the employer advised the claimant that all employees were to be vaccinated, or file for a religious or medical exemption. The claimant requested and was granted a religious exemption.

On or about November 16, 2021, the employer advised employees that New York State would no longer allow religious exemptions from vaccination. "All employees who work...in patient care settings must have a documented first dose of the Covid vaccine or a valid medical exemption in place by November 22 at 11:59 pm to continue working." The claimant did not apply for a medical exemption. Her primary care physician would not agree that the claimant was eligible for a medical exemption from the vaccination. The claimant did not obtain her first dose of the vaccination by November 22 and was separated from her employment, effective November 23, 2021.

OPINION: The credible evidence establishes that the claimant provoked her own discharge when she refused to get vaccinated despite the New York State mandate applicable to her employment. In so determining, we note that the claimant worked as an employee in a healthcare facility and was subject to the COVID-19 vaccination mandate issued by New York State. As the claimant was aware of the vaccine mandate and that she could be separated from employment if she chose not to be vaccinated, the claimant provoked her own discharge when she refused vaccination. In so doing, the claimant transgressed a legitimate, known obligation, leaving the employer no choice but a discharge. A provoked discharge is considered a voluntary leaving of employment without good cause for unemployment insurance purposes and subjects a claimant to a disqualification from receiving benefits. (See Matter of DeGrego, 39 NY2d 180 [3d Dept.1976]).

Insofar as the claimant's representative alleges, on appeal, that the mandate was a substantial change to the terms and conditions of the claimant's employment, a provoked discharge has been found even when the obligation arose after hire. (See Appeal Board No. 551483, as citing Appeal Board No. 420924). The claimant's decision to forgo a COVID-19 vaccination, despite the mandate to do so and her awareness of the consequences for failing to do so, left the employer no choice but to terminate the claimant's employment.

We note that employer bore a legitimate obligation under law to seek the claimant's vaccination. Although the claimant argues a religious exemption from vaccination, her contention is not persuasive. The mandate allowed for no religious exceptions after September 2021. Further, in *Dr. A et al v. Hochul*, 142 S.Ct. 552, 211 L. Ed. 2d. 414 (2021), the Court denied an application for injunctive relief in a challenge to New York State's law removing religious exemptions from its COVID-19 vaccine mandate for hospital workers, cert. denied, 142 S. Ct. 2569 (2022). Additionally, the Second Circuit in *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021), upheld New York's COVID-19 vaccine mandate for hospital employees without religious exemptions. The Court has also upheld the vaccine requirement for healthcare workers in healthcare facilities receiving Medicare or Medicaid funds. (See *Matter of Biden v. Missouri*, 211 L. Ed. 2d. 433 [2022]).

Although the claimant's representative then contends, on appeal, that the claimant resigned due to compelling family necessity, the claimant's representative raised no such contention at the hearing so to preserve the argument on appeal. Even if we were to consider "compelling family necessity," as per New York Labor Law § 593.1(b) (i-iii), we further note that a

separation for refusing to obey the New York Stat mandated vaccination requirement does not fall under any of the categories set forth therein.

The claimant's representative then argues that the claimant "wanted to seek a medical exemption...but her doctor would not give her such a medical exemption." We find it significant that the claimant never applied for a medical exemption. Any such argument about a denial is therefore speculative and specious.

Notwithstanding, we find it of further significance that the claimant also suggests that she would have considered the Comirnaty vaccination were it available. The Pfizer vaccine, which is now branded as the Comirnaty vaccine, was available as of August 2021. The claimant concedes she never inquired or discussed the Comirnaty vaccination with her doctor. Again, her contention fails to support her assertion that she had good cause to refuse to obey her known obligation and therefore undermines the reliability of her assertions.

Accordingly, the claimant has offered neither a reliable nor a reasonable excuse for refusing the vaccination which was required by the New York State

mandate. Consequently, we conclude that the claimant was separated from her employment under disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective November 23, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER